

LEGISLATIVE BILL 85

Approved by the Governor May 31, 2001

Introduced by Schimek, 27; Dw. Pedersen, 39; Chambers, 11

AN ACT relating to correctional services; to adopt the Private Prison Contracting Act; and to provide severability.
Be it enacted by the people of the State of Nebraska,

Section 1. This act shall be known and may be cited as the Private Prison Contracting Act.

Sec. 2. (1) The Department of Correctional Services is authorized to provide for incarceration, supervision, and residential treatment at facilities other than those operated by the Department of Correctional Services. Services offered for persons under the custody or supervision of the department are to include, but not be limited to, housing, treatment, medical and mental health services, work programs, education, and community corrections. Such services shall meet practices prescribed and established by the department for implementing such programs, including, but not limited to, practices concerning internal and perimeter security, discipline of inmates, educational and vocational training programs, employment of inmates, and proper food, clothing, housing, and medical care. Such services, if provided by private prison contractors, shall be contracted for as required by the Private Prison Contracting Act. All inmates incarcerated in a correctional institution operated under this subsection shall be treated in a reasonable and humane manner to the same extent as inmates incarcerated in a correctional institution operated by the department.

(2) The department is authorized to contract for the operation of correctional institutions of the department by private prison contractors. Such operation shall meet practices prescribed by the department, including, but not limited to, practices concerning internal and perimeter security, discipline of inmates, classification, educational and vocational training programs, and proper food, clothing, housing, transportation, and medical care. All inmates incarcerated in a correctional institution operated under this subsection shall be treated in a reasonable and humane manner to the same extent as inmates incarcerated in a correctional institution operated by the department. Contract requirements shall include, but not be limited to, the following:

(a) Drug testing of inmates as determined by the department;
(b) Compliance with all rules and regulations of the department;
(c) A requirement that the contractor report all crimes connected with the facility to the department, to local law enforcement agencies having jurisdiction of the facility, and, for a crime committed at a state institution, to the Nebraska State Patrol;

(d) A requirement that the facility be staffed at all times with a staffing pattern approved by the department and that failure to fill vacancies, as defined by the department, shall result in penalties as determined by the department;

(e) A requirement that all employees of the private prison contractor meet training requirements as determined by the department;

(f) Requirements relating to exercise of force and use of firearms as follows:

(i) Employees of a private prison contractor shall be allowed to use force and to exercise their powers and authority only (A) while on the grounds of an institution operated in whole or in part by their employer, (B) while transporting inmates, and (C) while pursuing escapees from an institution;

(ii) An employee of a private prison contractor shall be allowed to carry firearms if the private prison contractor and the employee meet all federal, state, and local requirements regarding the possession and carrying of firearms. Such employee shall only be allowed to use a firearm (A) to prevent an inmate's escape from a facility or from custody while being transported to or from a facility and (B) to prevent an act by an inmate which would cause death or serious bodily harm. For purposes of this subdivision, to prevent escape from a facility means to prevent an inmate from crossing the secure perimeter of a facility; and

(iii) Duly authorized persons who meet all the training and licensing requirements of the state where they are employed and who enter Nebraska for the purpose of transporting inmates of other states shall be authorized to use force while transporting and apprehending such inmates and shall be authorized to use deadly force under the circumstances as set forth

in subdivision (ii) of this subdivision.

Subdivision (2)(f) of this section does not confer peace officer status on the private prison contractor or its employees or persons from other states and does not authorize the use of firearms, except in accordance with such subdivision;

(g) A provision that any offense which would be a crime if committed within a state or local correctional facility shall be a crime if committed in a facility operated by a private prison contractor; and

(h) A statement that the contract does not authorize, allow, or imply a delegation of authority or responsibility to any private prison contractor to perform any of the following:

(i) Calculating inmate release and parole eligibility dates;

(ii) Granting, denying, or revoking sentence credits;

(iii) Approving inmates for furloughs, work release, or parole; or

(iv) Approving the type of work inmates may perform or the wages or sentence credits which may be given the inmates engaging in such work.

(3) The department is authorized, only upon the condition that there is a need for more bed spaces when existing facilities are operating at maximum capacity of one hundred twenty-five percent, to seek approval for the construction of one or more correctional institutions of the department by private prison contractors.

(4) A comprehensive file for all private prison contractors interested in and capable of operating one or more correctional institutions of the department or providing for the housing, care, and control of inmates in a correctional facility owned and operated by the contractor shall be maintained by the department. The file shall include:

(a) A completed application form received from the private prison contractor;

(b) A resume of the private prison contractor's staff and capability;

(c) A completed performance evaluation form from past projects on which the contractor has provided private prison services;

(d) A list of past contracts with the state;

(e) A list of contracts to provide similar services to other states or to the United States; and

(f) The mailing address of each private prison contractor.

Any person or firm wishing to be a private prison contractor may request at any time to be included in the comprehensive file and shall be provided necessary forms within twenty days of the request, and the department shall add such contractor to the list within twenty days of receipt of a properly completed application. The department may solicit evaluation of work done by private prison contractors from members of the private sector, which evaluation shall be part of the comprehensive file.

(5) If the department intends to contract with a private prison contractor, subject to the requirements of subsection (3) of this section, all persons and firms included in the comprehensive file established pursuant to subsection (4) of this section shall be notified by mail of such intent. Such notification shall contain the following information:

(a) A description and the scope of the project;

(b) Estimated time schedule for the project;

(c) The final date for submitting to the Director of Correctional Services notice of interest in contracting; and

(d) Other pertinent data as determined by the department.

A private prison contractor desiring consideration shall meet the requirements of this section and, to be considered, shall submit a letter expressing interest in the project to the department within thirty days after the postmark date of the letter of notification mailed by the department. The contractor shall file an updated application form if requested by the department.

(6) The department shall define the scope of a proposed project, determine the various project components, phases, and timetables, and prepare detailed project descriptions to guide prospective contractors. Before the department awards a contract to a private prison contractor, the plans shall be approved by the Director of Correctional Services.

(7) The department shall review the files of the private prison contractors desiring consideration for the project. The review shall consider the requirements of the project, replies to inquiries to former clients of the private prison contractor, and the following factors to be determined from the comprehensive file:

(a) Specialized experience in the type of work contemplated;

(b) Capacity of the private prison contractor to accomplish the work in the required time; and

(c) Past performance, from the performance evaluation form.

(8) A full report of the evaluation procedures and recommendations of the department shall be prepared by the department and submitted to the director for his or her independent review of the entire process.

(9)(a) The department shall select the private prison contractor whose qualifications and project proposal most substantially meet the criteria of the project description.

(b) The department shall execute the contract with the selected contractor, which contract shall include a fair and reasonable fee.

(c) The negotiated scope and fee shall be reported to the director for his or her approval of the award of the contract.

(10) The Department of Administrative Services shall assist the Department of Correctional Services in implementing the contracting procedures provided for in this section. The Department of Administrative Services may have a representative at any meeting involving negotiations of a contract between the Department of Correctional Services and a private prison contractor. Before submission of the proposed contract to the Governor, and prior to the date as of which the proposed contract is executed by the Department of Correctional Services, the Attorney General and the Director of Administrative Services shall review the proposed final version of the contract. The Attorney General and the Director of Administrative Services shall, within fifteen days after receipt of the proposed final version of the contract, either disapprove the contract or approve and execute the contract. If either the Attorney General or the Director of Administrative Services has objections to the proposed contract, the objections shall be communicated in writing to the Department of Correctional Services. The Department of Correctional Services shall take appropriate action regarding the objections and shall resubmit the proposed contract for additional review. The Attorney General and the Department of Administrative Services shall have an additional fifteen-day period to approve and execute the proposed contract. Failure of either the Attorney General or the Director of Administrative Services to act within the fifteen-day period shall constitute approval of the respective official to the proposed final version of the contract. The contract shall contain a separate signature block or line for signatures by the Attorney General and the Director of Administrative Services. The contract shall contain a statement to be executed by the Attorney General and the Director of Administrative Services that each one of them has reviewed the proposed contract for compliance with this section and all other applicable provisions of law and that the contract conforms to those requirements. Neither the private prison contractor nor the Director of Correctional Services shall execute the contract until the document has been executed by the Attorney General and the Director of Administrative Services as required by this subsection unless the approval of the Attorney General or the Director of Administrative Services is the result of failure to take action within the fifteen-day period prescribed by this subsection.

(11) The Director of Administrative Services may lease real property and improvements on such property to a private prison contractor in conjunction with a contract for private management of a state correctional institution located or to be built on the property. The lease may be entered into for a two-year term renewable at the sole option of the State of Nebraska.

(12) A contract awarded to a private prison contractor pursuant to this section shall be entered into for a period specified in each contract, subject to availability of funds annually appropriated by the Legislature for that purpose. No contract awarded pursuant to this section shall provide for the encumbrance of funds beyond the amount available for a fiscal year.

(13) No contract authorized pursuant to this section shall be awarded until the private prison contractor demonstrates to the satisfaction of the Department of Correctional Services:

(a) That the contractor possesses the necessary qualifications and experience to provide the services specified in the contract;

(b) That the contractor can provide the necessary qualified personnel to implement the terms of the contract;

(c) That the financial condition of the contractor is such that the terms of the contract can be fulfilled; and

(d) That the contractor has the ability to comply with applicable court orders and corrections practices.

(14) No contract authorized pursuant to this section shall be awarded until the private prison contractor demonstrates to the satisfaction of the Department of Correctional Services that the contractor can obtain insurance or provide self-insurance to compensate the state for any property damage or expenses incurred due to the operation of prison facilities and can

indemnify the state against possible lawsuits arising from the operation of prison facilities by the private prison contractor.

(15) A private prison contractor shall not be bound by state laws or other legislative enactments governing the appointment, duties, salaries, or benefits of wardens, superintendents, or other correctional employees, except that any personnel authorized to carry and use firearms shall comply with the certification standards required by law and be authorized to use firearms only to prevent a felony, to prevent escape from custody, or to prevent an act which would cause death or serious bodily injury to the personnel or to another person.

(16) Any offense which would be a crime if committed within a state correctional institution also shall be a crime if committed in an institution or facility operated by a private prison contractor.

(17) The Director of Correctional Services or his or her designee shall monitor and evaluate the performance of the private prison contractor. Monitoring and evaluation to be considered comprehensive shall include, but not be limited to:

(a) The request for proposal process, bid process, and construction and contract phases;

(b) Compliance with the contract, including the provision of essential services;

(c) Compliance with performance criteria, including American Correctional Association accreditation standards, and penalties for noncompliance;

(d) Unlimited and unrestricted access to all parts of the facility with or without notice and all reports and records of the facility except the contractor's financial records;

(e) Authority to enforce compliance, including authorization to impose a fine on the contractor for the contractor's failure to perform its contractual duties or authority to cancel the contract if appropriate; and

(f) Reports by the contractor on compliance or performance measures, including, but not limited to, significant incidents as determined by the Department of Correctional Services.

Sec. 3. (1) The Department of Correctional Services shall develop criteria for the process by which a contractor for the construction or operation, or both, of a private prison is to be awarded a contract. The criteria shall be subject to approval by the Director of Correctional Services. The criteria for selection of a site for a proposed facility to be constructed or operated, or both, by a private prison contractor shall include, but shall not be limited to, the availability of medical services, support services, and transportation services and the availability of potential employees who would be qualified to perform required functions at a state correctional facility.

(2) Any contract between the department and a private prison contractor pursuant to which the private prison contractor provides for the housing, care, and control of inmates in a nondepartmental facility operated by the private prison contractor shall contain, in addition to other provisions, the following terms and conditions:

(a) Requiring the private prison contractor to provide such services in a facility which meets accreditation standards established by the American Correctional Association;

(b) Requiring the contractor to receive and maintain accreditation for the facility from the American Correctional Association within two years after commencement of operations of the facility;

(c) Requiring the Department of Correctional Services to determine where the facility is to be located and to obtain written authorization from the appropriate municipality or the county board of the county in which the facility is to be located; and

(d) Granting the department the option at the beginning of each fiscal year, pursuant to an agreement, to purchase any such facility, with or without inventory or other personal property, at a predetermined price which shall be negotiated and included in a schedule or a formula to be contained in the original agreement.

(3) A private prison contractor proposing to enter a contract with the department for construction or operation, or both, of a correctional facility pursuant to this section shall demonstrate:

(a) The qualifications and the operations and management experience to carry out the terms of the contract; and

(b) The ability to comply with the standards of the American Correctional Association and with specific court orders.

(4) In addition to meeting the requirements specified in the request for proposals, a proposal for the construction and operation of a correctional

facility shall:

- (a) Provide for regular, onsite monitoring by the department;
 - (b) Acknowledge that payment by the state is subject to the availability of appropriations;
 - (c) Provide for payment of a maximum amount per fiscal year;
 - (d) Provide for meeting performance criteria or be subject to penalties;
 - (e) Demonstrate a cost benefit to the State of Nebraska when compared to the level and quality of programs provided by state correctional facilities that have similar types of inmates at an operational cost not more than the cost of housing inmates in similar facilities and providing similar programs to those types of inmates in state-operated facilities. The department shall be responsible for determining the costs and benefits of the proposal;
 - (f) Permit the state to terminate the contract for cause;
 - (g) Contain a per diem operational cost per inmate for the initial year of operations;
 - (h) Subject to appropriations, provide that cost adjustments may be made only once each fiscal year, to take effect at the beginning of the next fiscal year using as the maximum percentage increase, if any, an increase not to exceed the previous year's Consumer Price Index for All Urban Consumers as prepared by the United States Department of Labor, Bureau of Labor Statistics;
 - (i) Have an initial contract term of not more than two years, with an option to renew;
 - (j) If the proposal includes construction of a facility, contain necessary bonds and performance conditions approved by the department that are adequate and appropriate for the proposed contract;
 - (k) Provide for assumption of liability by the private prison contractor for all claims arising from the services performed under the contract by the private prison contractor;
 - (l) Provide for an adequate plan of insurance for the private prison contractor and its officers, employees, and agents against all claims, including claims based on violations of civil rights arising from the services performed under the contract by the private prison contractor;
 - (m) Provide for an adequate plan of insurance to protect the state against all claims arising from the services performed under the contract by the private prison contractor and to protect the state from actions by a third party against the private prison contractor, its officers, employees, and agents as a result of the contract;
 - (n) Provide plans for the purchase and assumption of operations by the state in the event of the bankruptcy of the private prison contractor; and
 - (o) Contain comprehensive standards for conditions of confinement.
- (5) At the end of each fiscal year, the department shall determine the average daily cost per inmate for the operational costs at each major category of correctional facility. There shall be a separate computation of the average daily rate for medium security, minimum security, and community corrections facilities.
- (6) If no proposals conform to the established criteria, the department shall prepare an additional request for proposals. The department shall evaluate the proposals within thirty days after receipt from the prospective private prison contractors. The department shall specifically determine whether a proposal meets the requirements of subdivision (4)(e) of this section by comparing the daily rate for housing and care of inmates pursuant to any proposed contract with a private prison contractor to the daily rate for housing and care of inmates at the comparable type of facility operated by the department. The department shall evaluate proposals taking into account any direct or indirect costs that would continue to be paid by the department, including, but not limited to, transportation, records management, discipline, general administration, management of inmate trust funds, and major medical coverage. Such costs shall be added to the proposed per diem of the private prison contractor when comparing the total per diem costs of facilities operated by the state.
- (7) If the department proposes to enter into a contract for the construction or the operation, or both, of a private prison, the department shall compare both the capital costs and the operating costs for the facility to the imputed capital costs and the projected operating costs of a comparable facility constructed and operated by the department.
- (8) A selection committee shall be established and shall deliver to the Director of Correctional Services a list containing the top three qualified prospective private prison contractors identified pursuant to this section together with the information reviewed and analyzed by the department during analysis of the proposals as required by this section. The director

shall evaluate the information provided and shall make a final decision selecting the contractor within thirty days after receipt of the list and the information.

(9) Any contract subject to this section entered into by the Department of Correctional Services shall be subject to the approval of the Governor.

Sec. 4. (1) The Department of Correctional Services shall develop criteria for selection of a site upon which to construct the correctional facilities. The criteria shall include, but shall not be limited to, the availability of medical services, support services, and transportation services, the availability of potential employees who would be qualified to perform required functions at a state correctional facility, and any benefits of incentives offered by the applicant. The criteria shall be subject to approval by the Director of Correctional Services.

(2) The department shall establish a process for requesting proposals to construct a correctional facility built with the funds authorized.

(3) Proposals shall be submitted not later than sixty days after receipt of the request for proposals. The department shall identify the proposals meeting the criteria approved pursuant to subsection (1) of this section within sixty days after receipt of the proposals. The department shall identify by appropriate review and analysis the proposals submitted and shall select a maximum of three proposals which conform to the criteria set out in subsection (1) of this section and shall forward the proposals meeting criteria to the director.

(4) Any plans developed pursuant to the process for selection of a private prison contractor for construction of a facility authorized under the Private Prison Contracting Act shall become the nonexclusive property of the State of Nebraska as a condition of the award of the final contract for construction of the facility. The State of Nebraska shall not be obligated to obtain any further permission for use of the plans or to make payment to any person or other legal entity for the further use of the plans as may be needed for additional projects for site adaptation for buildings, structures, or both, for use by the department.

(5) The department shall be responsible for any changes or updates of such plans for construction of any additional correctional facility constructed using the plans described in subsection (4) of this section.

(6) If the department requires architectural, engineering, or other consulting services in addition to those services authorized by this section, the department shall be authorized to enter into a contract with any architect or engineer or for other necessary services, as may be required in order to adapt existing plans for new sites for additional correctional facilities. The costs of any such services shall be paid by the department.

Sec. 5. A private prison contractor shall not accept or house federal inmates or inmates from another state.

Sec. 6. The Private Prison Contracting Act does not authorize a county or other political subdivision to enter into a contract with a private prison contractor to construct or operate a correctional facility within or on behalf of such county or other political subdivision.

Sec. 7. The Department of Correctional Services shall adopt and promulgate rules and regulations to carry out the Private Prison Contracting Act.

Sec. 8. If any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions.